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No. 82-401

In The
Supreme Court of the United States
October Term, 1982

BAXTER RICE, Individually and as Director of the Department of Alcoholic Beverage Control of the State of California,

Petitioner,

vs.

EVA REHNER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE OF MONTANA IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Does 18 U. S. C. § 1161 exclude state license requirements and regulation of the importation, distribution, and sale of alcoholic beverages in "Indian country" within a state's boundaries?

If 18 U. S. C. § 1161 does exclude state exercise of these powers, does it violate the Twenty-first Amendment?

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No. 82-601

In The

Supreme Court of the United States

October Term, 1982

BAXTER RICE, Individually and as Director of the Department of Alcoholic Beverage Control of the State of California,

Petitioner,

vs.

EVA REHNER,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE OF MONTANA IN SUPPORT OF PETITIONER

INTEREST OF THE STATE OF MONTANA

All of the fifty states exercise control over the sale and distribution of alcoholic beverages. Montana is one of eighteen states which regulates the sale and distribution of liquor through a state monopoly system. The remaining thirty-two states, including California, are "license" states which regulate distribution and sales of liquor through a system enforced through licensing. *Distilled Spirits Council of the United States, Summary of State Laws and Regulations Relating to Distilled Spirits, 1977*, pp. 26-27.

Montana has a vital interest in maintaining order in the liquor traffic within its boundaries. Like all other states, Montana regulates liquor traffic as part of its general "police power", recognizing that it has a duty to balance effectively the well-known deleterious effects of alcohol availability against the responsible consumption of alcoholic beverages which numerous citizens—on and off Indian reservations—find enjoyable.[1] The Ninth Circuit opinion gives Indian tribes exclusive control of liquor traffic within Indian country. If left standing, the Ninth Circuit opinion will destroy the finely honed and pervasive statutory schemes for liquor regulation developed by Montana and all other states having Indian reservations within their boundaries.

Montana has long regulated liquor traffic statewide—the only geographic exception has been Indian reservations where, prior to 1953, Congress forbade the distribution or possession of liquor. Since 1953 when Congress passed the Act of August 15, 1953, P. L. 83-277, 67 Stat. 586, 18 U. S. C. § 1161, creating a right to possess liquor in Indian country in conformity with state law, Montana has asserted its regulatory control on Indian reservations where liquor is sold.

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[1]Montana ranks second, nationwide, in beer consumption, with a consumption rate of 35.78 gallons per capita; 13th nationwide in wine consumption, with a consumption rate of 2.57 gallons per capita; and 27th nationwide in distilled spirits consumption, with a consumption rate of 1.97 gallons per capita. *Distilled Spirits Council of the United States, Summary of State Laws and Regulations Relating to Distilled Spirits, 1980*, p. 19, Table 14.

Montana's liquor[2] regulation laws are all-encompassing.[3] Montana limits the number of liquor licenses by population through its "quota system."[4] It imposes a liquor license tax and beer and wine taxes which are earmarked for specific uses. The liquor license tax, M. C. A. § 16-1-405, is distributed in proportion to consumption, to the counties and incorporated cities and towns for law enforcement and the regulation and control of the sale and use of liquor, and to the Montana Department of Institutions for the treatment, rehabilitation and prevention of alcoholism. M. C. A. § 16-1-404(3). Similarly, the beer tax is distributed to incorporated cities and towns for use "for state purposes such as law enforcement, maintenance of the transportation system and public health." M. C. A. § 16-1-410. The tax on wine goes, in part, to the general fund of the state, and to the ear-

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[2]Although the Montana statutes distinguish among "liquor," beer, wine and table wine, Mont. Code Ann. [hereinafter M. C. A.] § 16-1-106, this brief includes all alcoholic beverages in the word "liquor" unless otherwise stated.

[3]The stated policy of the "Montana Alcoholic Beverage Code" is "to effectuate and ensure the entire control of the manufacture, sale and distribution of liquor within the State of Montana . . . [as] an exercise of the police power of the state, in and for the protection of the welfare, health, peace, morals and safety of the people of the state, and its provisions shall be construed for the accomplishment of such purposes." M. C. A. § 16-1-101. Montana's regulation of the sale and distribution of liquor is an unquestioned proper governmental function with the police power of the state. *State v. Andre*, 101 M. 366, 371, 54 P. 2d 566 (1936).

[4]In the November 1982 election, Montana's voters resoundingly defeated an initiative which would have done away with this quota system for purposes of licensing on-premises consumption of beer and wine. The Montana electorate, which of course includes Indian voters, showed its desire to continue the current system of limiting licenses.

marked funds for the Department of Institutions and the cities, towns and counties for use in alcoholism and law enforcement related services. M. C. A. § 16-1-411(3). The tribes on the Flathead, Blackfeet and Fort Belknap reservations receive state liquor license tax and beer and wine tax funds through the Montana Department of Institutions for tribal on-reservation Indian alcoholism treatment programs.

Montana regulates all alcoholic beverages within the state.[5] Beer and wine may be distributed only to licensees of the state. Liquor (other than beer and wine) must be obtained through state liquor stores, either directly by the consumer, or by limited licensed outlets for re-sale.[6] Thus, there is now no legal way to obtain liquor, beer and wine in Montana without complying with Montana's regulatory system. M. C. A. Title 16, ch. 1-6.

The Ninth Circuit opinion in this case is exceptionally threatening to Montana because there are seven Indian reservations within the state's boundaries. Two of these, the Crow and the Northern Cheyenne Indian Reservations, are "dry" reservations, where the resident tribes have opted not to allow on-reservation liquor transactions to take place. The remaining five Montana Indian reservations where liquor transactions do take place are not isolated, purely Indian enclaves. On the contrary,

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[5]See note 8 *infra* for an administrative exception.

[6]The Montana monopoly on liquor (as opposed to beer and wine) affects availability and consumption. Montana's rank of second nationwide in consumption of beer, which is readily available from distributors, contrasts dramatically with its rank as 27th in the per capita consumption of liquor, which is available only through the state liquor stores. See note 1 above.

of their total population of approximately 39,919 people, more than half, approximately 23,363, are non-Indians.[7] The state operates liquor stores on these five Indian Reservations, with total sales in the state stores alone amounting to $2,497,222.00 in fiscal year 1981-82. Additionally, the state licenses various establishments selling alcohol on these reservations under its quota system. On at least two of these five Reservations, to the state's knowledge, the resident tribes either have adopted an approved ordinance regarding tribal licensing of the sale of some alcoholic beverages, or are in the process of having such licensing ordinance approved. These reservations are the Blackfeet Reservation, where approximately 25% of the population is non-Indian, and the Flathead Reservation, where approximately 87% of the population is non-Indian. On the Flathead Reservation, the Confederated Salish and Kootenai Tribes have leased four Tribal Community Centers to Tribal members, and beer and wine are served there without state licenses.[8]

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[7]The source for this information is *Census of Population and Housing, 1980: P. L. 94-171 Population Counts,* Summary Tape File. The population breakdown for the five reservations on which liquor transactions take place is as follows: 6,660 people on the Blackfeet Reservation, 1,578 of whom are non-Indian; 19,628 people on the Flathead Reservation, 15,852 of whom are non-Indian; 2,060 people on the Fort Belknap Reservation, 184 of whom are non-Indian; 9,921 people on the Fort Peck Reservation, 5,648 of whom are non-Indian; and 1,650 people on Rocky Boy's Reservation, 101 of whom are non-Indian.

[8]Approximately one year ago, while this case was pending in the Ninth Circuit, the Confederated Salish and Kootenai Tribes passed their beer and wine ordinance setting forth the requirements for tribal licenses, including that all state law requirements be met, except actual acquisition of a state license.

(Continued on next page)

Montana anticipates an increased number of liquor outlets on Indian reservations should this Court affirm the Ninth Circuit's decision.[9] The large non-Indian populations living on or near Indian reservations would take advantage of the increased availability of liquor. Moreover, two of the reservations abut, include or are enroute to major tourist attractions: Flathead Lake and Glacier National Park. Other Montana reservations are located on major thoroughfares for interstate travel. Obviously, tourists (both Indian and non-Indian) could be expected to take advantage of the increased number of liquor outlets.

The inevitable result of exclusive tribal licensing is that the state's legitimate exercise of police power in total regulation of liquor will be defeated. Maintenance of the state-wide license quota system, if operative only outside of Indian country as defined in 18 U. S. C. § 1154(c), will be an exercise in futility. Instead the Indian tribes on Montana's seven reservations, easily accessible to on and off-reservation residents and tourists, could impose their

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Beer and wine distributors, prohibited by Montana law from delivering to anyone without a Montana license, pressed the Montana Department of Revenue for a policy statement about deliveries to tribal licensees. Rather than precipitate litigation when faced with this dilemma, the Department promulgated a temporary policy pending this litigation, and notified distributors that Montana would not attempt to prohibit deliveries to tribal licensees under a tribal ordinance which, in effect, adopted virtually all of the Montana licensing requirements and which did not interrupt Montana's tax collections.

[9]According to the Ninth Circuit, the tribe could determine whether or not any license from the tribe is required. It is possible that tribes might adopt an ordinance simply authorizing sales of liquor without any licensing requirements.

respective (and very probably uncoordinated) systems upon Indians' and non-Indians' liquor transactions, effectively vitiating the carefully developed state regulatory scheme. Montana and its citizens would be stripped of ability to limit availability of alcohol and fund law enforcement and alcoholic treatment programs from alcohol related taxes. Tribal governments could not provide substitute services to non-Indian populations on and near their reservations, once the state regulatory system was destroyed.

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SUMMARY OF ARGUMENT

The decision of the Ninth Circuit in this case vests an Indian tribe with exclusive control over liquor transactions in Indian country. This tribal control would exist regardless of whether the sellers and purchasers are Indian or non-Indian. The state is thus ousted from exercising its legitimate governmental police power over these liquor transactions, even though they include numerous sales to non-Indians.

All states traditionally have controlled and regulated the sale of liquor within their borders as a proper exercise of state police power, except for the years between 1920 and 1933 when prohibition was in effect, and except with regard to Indian tribes, prior to 1953 when no liquor transactions in Indian Country were permitted by any one under any circumstances. The Twenty-first Amendment to the United States Constitution expressly authorizes this state police power. Since 1953, when it passed 18 U. S. C. § 1161, Congress has statutorily recog-

nized the state's power on Indian reservations, so long as the resident Tribe enacts an ordinance allowing liquor transactions within its "Indian country" as defined by 18 U. S. C. § 1154(c). The language, intent, and legislative history of 18 U. S. C. § 1161 all show that Congress intended that states' regulatory authority over liquor transactions does include Indian reservations. Congress recognized the common situation where non-Indians are at least as likely as Indians to be involved in on-reservation liquor transactions. This Court should reverse the decision of the Ninth Circuit and enable the states to continue to license and otherwise regulate the sale and distribution of liquor in Indian country.

ARGUMENT

Liquor is a unique subject matter which is a most appropriate subject for the exercise of state police powers. History teaches us that questions involving liquor regulation are among the most vexing questions which governmental entities address. For many years the Nation itself struggled with the question of whether alcohol should be available to any citizen. This struggle culminated in ratification of the Eighteenth Amendment prohibiting anyone in the United States from making, distributing or consuming alcoholic beverages. After thirteen years of Prohibition, the Twenty-first Amendment was ratified, repealing Prohibition and leaving to the states the power to regulate liquor traffic. That Amendment states in pertinent part that the "transportation or

importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquor, *in violation of the laws thereof* is hereby prohibited." (emphasis supplied).

Consistent contemporaneous case law from this Court holds that the intent of the Twenty-first Amendment was to grant to states regulatory authority over alcoholic beverages within their borders, even to the point of overriding the provisions of the "commerce clause" (Art. I, § 8, cl. 3) of the United States Constitution. *E.g. State Board of Equalization of California v. Young's Market Co.*, 299 U. S. 59, *rehearing denied*, 299 U. S. 623 (1936).[10] It is the "commerce clause" which authorizes Congress to exercise legislative power with respect to Indian tribes, *e.g., United States v. Forty-three Gallons of Whiskey*, 93 U. S. 188 (1876), so that the overriding intent of the Twenty-first Amendment and the power it grants states over the control of liquor is particularly significant here.

Notwithstanding the Twenty-first Amendment's recognition of state authority to regulate liquor traffic, Congress grappled for years with the question of whether Indians and Indian country should be subject to a special prohibition from possession or distribution of liquor. Prior to 1953, Congress completely prohibited the introduction, possession or sale of liquor in Indian country,[11] or to an Indian in any place. 18 U. S. C. §§ 1154 and 1156.

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[10]As discussed in note 3 *supra*, the Montana Supreme Court has held likewise in relation to Montana's laws relating to liquor within the state borders.

[11]Patrons of all seven Indian reservations in Montana are "Indian Country" as defined in 18 U. S. C. § 1154 (c).

Prior to 1953, neither Indians nor Indian tribes had any power or control with respect to alcohol on or off of their reservations.[12] Congress did not consider regulation of liquor to be an aspect or function of tribal sovereignty independent of Congressional grant of power to regulate liquor.

In 1953, Congress ended the prohibition against the sale of alcohol to an Indian because it was discriminatory. At the same time, Congress ended the absolute prohibition against the introduction, possession, or sale of liquor in Indian country, "provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the Tribe having jurisdiction over such area of Indian country." 18 U. S. C. § 1161.

Section 1161, then, recognizes the broad police powers of the states, and on its face *requires* compliance with all state laws. The Twenty-first Amendment prohibits Congress from excluding states from exercising regulatory authority within their boundaries, including in Indian country.

In addition to compliance with state laws, Section 1161 requires that for liquor transactions to be allowed

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[12]Congressional restriction of liquor transactions with Indians began in 1802, and the first federal criminal statutes relating to the introduction of alcohol in Indian country were enacted in 1832. This Congressional prohibition was for the purpose of protecting Indians from unscrupulous white traders and to prevent breaches of the peace and Indian wars and depredations thought to arise from excessive use of liquor by Indians. Cohen, *Federal Indian Law*, 1942, 352-353. *See also*, letter of the Secretary of Interior to Congress in 1946, 92 Cong. Rec. 4533-4534, 79th Cong. 2nd Sess.

in "Indian country" the resident tribe must adopt an ordinance allowing such transactions. Absent the adoption of such an ordinance, "Indian country" within Indian reservations remains "dry." As mentioned *supra,* that is the case in Montana on the Crow and Northern Cheyenne Reservations. This power of Indian tribes to accept or reject the repeal of federal prohibition statutes is the delegation of congressional authority affirmed by this Court in *United States v. Mazurie,* 419 U. S. 544 (1975). However, if a tribe does consent to the repeal of the previous absolute federal prohibition, liquor transactions may occur *only as long as there is also compliance with the laws of the state.*

As discussed above in "Interest of the State of Montana," the thrust of the laws of all of the fifty states in relation to liquor is the regulation of availability of liquor, either by creating a state monopoly system such as in Montana, Washington and sixteen other states, or by licensing according to some sort of "quota system" as is done in California and thirty-one other states. All of the states had these or similar regulations on the availability of liquor in effect in 1953 when Congress passed section 1161.

Given the clarity of language in section 1161, it is not necessary to analyze the legislative history or the intent of Congress in enacting the legislation. However, an examination of why and how section 1161 was passed in 1953, shows conclusively that state authority over liquor transactions in Indian country was intended. Section 1161 was one of various acts approved by the 83rd Congress directed at terminating specific tribes and Indian

reservations completely. Part of this "termination" policy of the United States government was to terminate many responsibilities of the federal government over Indians. This "termination" policy continued from approximately 1945 to 1965. The "cornerstone" of this policy was House Concurrent Resolution 108, which stated that Indian tribes and tribal members should be free "from Federal supervision and control and from all disabilities and limitations specially applicable to Indians." H. R. Con. Res. 108, 83rd Cong., 1st Sess., 67 Stat. B132 (1953). House Concurrent Resolution 108 also stated that it was Congress' policy

> as rapidly as possible *to make the Indians* within the territorial limits of the United States *subject to the same laws, and entitled to the same privileges and responsibilities as are applicable to other citizens* of the United States, and to grant them all the rights and prerogatives pertaining to American citizenship: .... (emphasis supplied)

This same 83rd Congress passed section 1161. In discussing a proposed redraft of H. R. 1055, the precursor to section 1161 designed to eliminate federal laws discriminating against Indians in various areas, including liquor, Dillon S. Myer, Commissioner of the Bureau of Indian Affairs, Department of the Interior, on March 18, 1953, said the proposed redraft was

> intended to eliminate all of the sections in the statutes which discriminate against Indians and at the same time not interfere with State laws, and at the same time provide opportunity for the tribes to have prohibition on the reservation if they wish to, if it is not otherwise covered by State law.

Less than three months after that remark was made, Representative Harold A. Patten of Arizona endorsed an

amendment to H. R. 1055 to insure there would be no liquor sales on or near school grounds, but did so with the comment that such an amendment was in fact unnecessary "because if this bill were passed to remove all discrimination, the Indians would still have to comply with the State law in every regard."[13]

Prior to amendment, section 2 of the original draft of H. R. 1055 required that only off-reservation liquor transactions be "in conformity with" state law; and section 3 required that on-reservation liquor transactions only be "in conformity with" a tribal ordinance.[14] Amendments to these distinctions were proposed[15] and the original draft of the bill was rejected by Congress in favor of the present form, which states that liquor transactions in Indian country must be in conformity with *both* state law and tribal ordinance. The opinion of the Ninth Circuit below is probably an accurate construction of the bill in its original form which seemed to require application of state law off the reservation and tribal law on the reservation. It is not supported by the amended final form, section 1161.

For liquor transactions with Indians outside of Indian country, Congress clearly intended that state regulatory systems apply. Likewise, it intended that state regulatory systems apply to liquor transactions that take

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[13]Report of Proceedings, Hearings on H. R. 1055 Before Committee on Interior and Insular Affairs, Subcommittee on Indian Affairs, 83rd Cong., 1st Sess., June 2, 1953, Statement of Representative Harold A. Patten, p. 3.

[14]Report of Proceedings, *ibid.*, H. R. 1055.

[15]Report of Proceedings, *ibid.*, March 18, 1953, Statement of Dillon S. Myer, Commissioner, Bureau of Indian Affairs, p. 8.

place within Indian Country. The plain language of section 1161 mandates that conclusion; the policy of Congress at the time of enactment of section 1161 mandates that conclusion; and the comments on, and the amendments to, the original bill mandate that conclusion.

The purpose and policy of Congress in 1953 is especially relevant in Montana, where the Indian reservations have been opened so extensively to non-Indian visitors and residents. Montana's Indian reservations have not been "terminated" in the sense of the word used in 1953, but they clearly are no longer used only by or for tribal members for whom they were set aside. The well-being of all Montanans requires that these facts be recognized and that the state be permitted to continue to exercise its broad police powers in regulating all liquor traffic.

CONCLUSION

Montana acknowledges that Indian Tribes have the power to enact ordinances with respect to liquor regulation in their own "Indian country." *United States v. Mazurie, supra.* However this power does not, and should not, prevent states from exercising their police power with regard to liquor transactions, which power is sanctioned by the United States Constitution and by the plain language of 18 U. S. C. section 1161. The Ninth Circuit's

decision ousting states from their long-standing authority in this very unique and important area should be reversed.

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